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SENI JAYA SDN BHD & ANOR v. DATO' HJ AHMAD TARMIZI HJ PUTEH & ANOR

FEDERAL COURT, PUTRAJAYA
AHMAD MAAROP PCA
DAVID WONG DAK WAH CJ (SABAH & SARAWAK)
B ZAINUN ALI FCJ
BALIA YUSOF WAHI FCJ
MOHD ZAWAWI SALLEH FCJ
[CIVIL APPEAL NO: 01(f)-29-09-2016(B)]
21 NOVEMBER 2018

C

CONTRACT: *Agreement – Breach – Agreement with media operators for billboard sites – Billboard advertisement scheme – Allegation by tenderer that there was breach of alleged agreement by town council to privatise to tenderer exclusive right to manage and operate all outdoor advertising sites in city – Allegations made based* D *on letter – Whether letter signified concluded contract – Whether there was clear and definite offer and absolute and unqualified acceptance – Whether payments made evidence of concluded contract – Whether there was concluded contract between parties – Contracts Act 1950, s. 7*

In 2003, the Sports Club of the second respondent was given the sole right E and license to manage the billboard sites in Petaling Jaya. The Sports Club then entered into agreements with the media operators where the relevant billboard licensed fees of the second respondent would be paid to the second respondent on behalf of the Sports Club, with an additional amount to be paid to the Sports Club. The payments were the consideration payable by the F licensed media operators for their rights to use the advertisement sites. The additional amounts to be paid to the Sports Club was the product of the mechanism put into place by the second respondent to allow the Sports Club to generate fund so that it could carry out its activities. The sponsorship amounts for the licensed sites were paid to the Sports Club account and not to the designated Local Authority Fund of the second respondent. However, G in 2005, the Sports Club and the second respondent had great difficulty in recovering the consideration due under the Sports Club agreements due to the fact that the Sports Club did not have the requisite manpower to effectively manage and administer the advertisement sites. To overcome this difficulty, the second respondent privatised the Billboard Advertisement Scheme and in H doing so, the second respondent called for tenders. The appellants, the media operators, were one of the three tenderers in the privatisation exercise. The appellants sued the respondents at the High Court for breach of an alleged agreement to privatise to them the exclusive right to manage and operate all the advertising sites in Petaling Jaya. The appellants submitted that, based I on a letter signed by the first respondent ('the letter'), the appellants made

payment to the Sports Club totalling to RM2.1 million. The High Court dismissed the appellants' suit, holding that, *inter alia*, the Sports Club could not lawfully be an agent of the licensing function of the second respondent and no contract had come into being with the appellants and, even if there was a contract, it was void for illegality. The High Court's decision was affirmed by the Court of Appeal. Hence, the present appeal. The questions that arose for adjudication were, *inter alia*, (i) whether there was a concluded contract between the parties; and (ii) whether the RM2.1 million paid could be legally construed as 'payment made' to the second respondent by the first appellant.

Held (dismissing appeal with costs)
Per David Wong Dak Wah CJ (Sabah & Sarawak) delivering the judgment of the court:

(1) Under s. 7 of the Contracts Act 1950 ('the CA'), for any concluded agreement to come into existence, there must be a clear and definite offer by the proposer and an 'absolute and unqualified' acceptance of the same by the offeree. The phrase 'absolute and unqualified' is critical, in that, any acceptance coupled with any condition can never be an 'absolute and unqualified' acceptance. It must be absolute, in that all, terms set out in the offer must be accepted. It must also be unqualified, in that acceptance attached with condition is a qualified acceptance. Once such conditional acceptance is on the negotiating table, the parties are simply back to the negotiating mode as there is now a counter-offer by the offeree which, in effect, rejects the proposal. Withdrawal of the conditional acceptance *per se* would not revive the original offer. Only with an absolute and unqualified acceptance of the counter offer by the proposer would there be a concluded contract between the proposer and the offeree. (para 21)

(2) Although the words 'agreed in principle' were used in the letter, they must be considered in the context of the entire letter. The proposal made by the appellants was not short in details and it was glaring in the response made by the second respondent, there was no reference to any of the proposed terms. In fact, in the second paragraph of the letter, it stated, in no uncertain terms, that important terms and conditions would be discussed between the parties. The letter was, at best, a qualified or conditional acceptance which in law was, in effect, a rejection. Furthermore, if there was a concluded contract, there was no necessity for the first appellant, by a letter, to protest the failure of the second respondent to reply on the proposed changes. Such protest simply inferred that there was no concluded contract until a formal agreement was executed by the parties. (paras 26 & 31)

(3) The terms proposed were complex and would require a well-trained commercial legal adviser to give proper advice as it involved the capacity of the second respondent, being a statutory body, to enter into business relationship with commercial enterprises. Furthermore, for the second respondent to enter into any commercial transaction of such nature, like any private commercial entity, it would require an appropriate approval in a form of minutes of council meetings. However, there was no such written approval by the second respondent. The lack of such written consent basically showed that it had not or could not agree to the proposal put forth by the appellants. (paras 28-29)

(4) The payment of RM2.1 million to the Sports Club by the appellants was a matter between the appellants and the Sports Club. There was no evidence to link that payment to the alleged concluded contract between the parties. At best, the payment was made in the hopes that there would be a concluded contract between the appellant and the second respondent. Hope, plus payments to a third party, could not be equated to a concluded contract. If the payment was part of the consideration to the proposed agreement, surely mention must be made of that consideration in the proposed agreement sent to the second respondent to consider. It did not make any sense not to mention that RM2.1 million consideration in the proposed agreement. (para 32)

Bahasa Malaysia *Headnotes*

Pada 2003, Kelab Sukan responden kedua diberi hak tunggal dan lesen untuk menguruskan tapak-tapak papan iklan di Petaling Jaya. Kelab Sukan kemudian memeterai beberapa perjanjian dengan pengendali media dan yuran papan iklan relevan berlesen responden kedua akan dibayar kepada responden kedua bagi pihak Kelab Sukan, dengan jumlah tambahan perlu dibayar kepada Kelab Sukan. Bayaran-bayaran adalah balasan yang perlu dibayar oleh pengendali-pengendali media berlesen untuk hak mereka menggunakan tapak-tapak iklan. Jumlah tambahan yang perlu dibayar kepada Kelab Sukan ialah hasil mekanisme yang ditetapkan oleh responden kedua untuk membenarkan Kelab Sukan menjana dana demi menjalankan aktiviti-aktivitinya. Jumlah tajaan tapak-tapak berlesen dibayar kepada akaun Kelab Sukan dan bukan Dana Pihak Berkuasa Tempatan responden kedua yang ditetapkan. Walau bagaimanapun, pada 2005, Kelab Sukan dan responden kedua menghadapi kesukaran memperoleh balasan terhutang bawah perjanjian Kelab Sukan kerana Kelab Sukan tidak mempunyai tenaga kerja yang diperlukan untuk menguruskan dan mentadbir tapak-tapak iklan dengan efektif. Untuk mengatasi kesukaran ini, responden kedua menswastakan Skim Pengiklanan Papan Iklan dan dalam berbuat demikian, responden kedua mempelawa tawaran. Perayu-perayu, iaitu pengendali

media, adalah tiga penawar dalam langkah penswastaan ini. Perayu-perayu menyaman responden-responden di Mahkamah Tinggi untuk pelanggaran dakwaan perjanjian untuk menswastakan mereka akan hak eksklusif untuk menguruskan dan mengendali kesemua tapak-tapak iklan di Petaling Jaya. Perayu-perayu menghujahkan, berdasarkan sepucuk surat yang ditandatangani oleh responden pertama ('surat tersebut'), perayu-perayu membuat bayaran berjumlah RM2.1 juta kepada Kelab Sukan. Mahkamah Tinggi menolak guaman perayu-perayu dan memutuskan, antara lain, Kelab Sukan tidak boleh menjadi agen sah fungsi pelesenan responden kedua dan tidak wujud kontrak dengan perayu-perayu dan, jika pun wujud kontrak, kontrak tersebut terbatal akibat ketaksahan. Keputusan Mahkamah Tinggi disahkan oleh Mahkamah Rayuan. Maka timbul rayuan ini. Soalan-soalan yang timbul untuk pemutusan ialah, antara lain, (i) sama ada wujud kontrak yang diputuskan antara pihak-pihak; dan (ii) sama ada RM2.1 juta yang dibayar boleh ditafsir, bawah undang-undang, sebagai bayaran yang dibuat oleh responden kedua kepada perayu pertama.

Diputuskan (menolak rayuan dengan kos)
Oleh David Wong Dak Wah HB (Sabah & Sarawak) menyampaikan penghakiman mahkamah:

(1) Bawah s. 7 Akta Kontrak 1950 ('AK'), agar apa-apa kontrak yang diputuskan wujud, mestilah terdapat tawaran yang jelas dan tetap oleh pencadang dan penerimaan 'mutlak dah tidak diragui' oleh penawar. Ungkapan 'mutlak dan tidak diragui' kritikal iaitu mana-mana penerimaan, serta apa-apa syarat, tidak boleh menjadi penerimaan 'mutlak dan tidak diragui'. Ini mestilah mutlak iaitu semua terma yang ditetapkan dalam tawaran mesti diterima. Ini juga mesti tidak diragui iaitu penerimaan syarat ialah penerimaan tidak diragui. Apabila penerimaan bersyarat dikemukakan, pihak-pihak kembali pada mod rundingan kerana kini terdapat tawaran balas oleh penawar yang, kesannya, menolak cadangan. Penarikan penerimaan bersyarat itu sendiri tidak akan menghidupkan tawaran asal. Hanya dengan penerimaan tawaran balas mutlak dan tidak diragui oleh pencadang barulah wujud kontrak yang diputuskan antara pencadang dan penawar.

(2) Walaupun perkataan-perkataan 'agreed in principle' digunakan dalam surat tersebut, perkataan-perkataan ini mesti dipertimbangkan dalam konteks keseluruhan surat. Cadangan yang dibuat oleh perayu-perayu tidak kurang butir-butirnya dan amat menonjol dalam respon responden kedua bahawa tiada rujukan pada mana-mana terma yang dicadangkan. Malah, dalam perenggan kedua surat tersebut jelas dinyatakan bahawa terma-terma dan syarat-syarat penting akan dibincangkan antara pihak-pihak. Surat tersebut, paling tidak, satu penerimaan sah dan bersyarat

yang, bawah undang-undang, jelas satu penolakan. Tambahan lagi, jika terdapat kontrak yang diputuskan, tiada keperluan untuk perayu pertama, melalui sepucuk surat, membantah kegagalan responden kedua membalas perubahan-perubahan yang dicadangkan. Bantahan sedemikian menyiratkan bahawa tiada kontrak yang diputuskan hinggalah satu perjanjian rasmi dimeterai oleh pihak-pihak.

(3) Terma-terma yang dicadangkan rumit dan memerlukan penasihat undang-undang komersial terlatih untuk memberi nasihat wajar kerana melibatkan kapasiti responden kedua, iaitu sebuah badan berkanun, untuk memasuki hubungan perniagaan dengan perusahaan-perusahaan komersial. Tambahan lagi, untuk responden kedua memasuki apa-apa transaksi komersial bersifat sedemikian, seperti mana-mana entiti komersial swasta, kelulusan wajar diperlukan dalam bentuk minit mesyuarat majlis. Walau bagaimanapun, tiada kelulusan bertulis sedemikian rupa oleh responden kedua. Ketiadaan kelulusan bertulis, secara asasnya, menunjukkan responden kedua tidak atau tidak boleh bersetuju dengan cadangan perayu-perayu.

(4) Bayaran RM2.1 juta kepada Kelab Sukan oleh perayu-perayu adalah hal perkara antara perayu-perayu dan Kelab Sukan. Tiada keterangan yang mengaitkan bayaran ini dengan kontrak yang didakwa telah diputuskan oleh pihak-pihak. Paling tidak, bayaran ini dibuat dengan harapan terdapat kontrak yang diputuskan antara perayu dan responden kedua. Harapan, serta bayaran kepada pihak ketiga, tidak boleh disamakan dengan kontrak yang diputuskan. Jika bayaran adalah sebahagian balasan perjanjian dicadangkan, pastinya disebut bahawa balasan perjanjian dicadangkan dibuat untuk pertimbangan responden kedua. Tidak masuk akal jika balasan RM2.1 juta tidak disebut dalam perjanjian yang dicadangkan.

Case(s) referred to:

Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd [1994] 3 CLJ 133 SC ***(refd)***

Deutsche Bank (Malaysia) Bhd v. MBf Holdings Bhd & Anor [2015] 8 CLJ 1068 FC ***(refd)***

Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors [2003] 3 CLJ 349 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, s. 7(a)

Courts of Judicature Act 1964, ss. 78(1), 96(a)

For the 1st & 2nd appellants - Muhammad Shafee Abdullah, Sarah Abishegam & Wee Yeong Kang; M/s Shafee & Co

For the 2nd respondent - Cyrus V Das, Kamaruzaman M Arif & Sofiah Omar; M/s Kamaruzaman Arif, Amran & Chong

[Editor's note: For the Court of Appeal judgment, please see Seni Jaya Sdn Bhd & Anor v. Dato' Hj Ahmad Tarmizi Hj Puteh & Anor [2017] 1 LNS 118 (affirmed).]

Reported by Najib Tamby

JUDGMENT

David Wong Dak Wah CJ (Sabah & Sarawak):

Introduction

[1] This is an appeal from the judgment of the Court of Appeal which had confirmed the decision of the High Court. The appellants were the plaintiffs in the High Court and had sued the respondents/defendants for breach of an alleged agreement to privatise to them the exclusive right to manage and operate all the outdoor advertising sites in the city of Petaling Jaya through the agency of the MPPJ Sports Club.

[2] The appellants had applied for leave to appeal to the Federal Court pursuant to s. 96(a) of the Courts of Judicature Act 1964 and on 30 August 2016, this court granted leave to appeal on three questions of law.

[3] We had heard the appeal and reserved judgment for deliberation. We have since given further due consideration to the submissions of respective counsel and now give our decision and grounds.

[4] This judgment is prepared pursuant to s. 78(1) of the Courts of Judicature Act 1964, as our learned sister, Justice Zainun Ali has since retired.

Leave Questions

[5] This court allowed the following questions of law:

(i) Whether the Agreement between the Second Respondent (an arm of the state Authority) and the First Applicant was entered into *'ultra vires'* and/or in breach of the statutory provisions under Sections 65 to 67 of the NLC where TOL (Temporary Occupation Licences) under the licensing of the State Authority were not obtained for the purposes of the advertising billboards or where such non-compliance makes the agreement merely voidable?

(ii) Whether the Sports Club can in law be an agent of the Second Respondent within the meaning and purport of Section 36(1) of the Local Government Act 1976 when it has been specifically authorised to receive the benefits of the payments by the Applicants by the 2nd Respondent itself?

(iii) If the answer to the above is in the affirmative, whether the RM2.1 million paid by the 1st Applicant can be legally construed as 'payment made' to the Second Respondent by the First Applicant under the statute?

A **Background Facts**

[6] The appellants are private limited companies who engage in business as media operators with outdoor billboard advertisements as one of their main operation. The first appellant, prior to the termination by the second respondent, was one of 58 licensed media operators commissioned by the
B second respondent to operate and manage billboard advertising sites in the city of Petaling Jaya.

[7] The first respondent was the President of Majlis Perbandaran Petaling Jaya (MPPJ), which is the second respondent, being the local authority for the city of Petaling Jaya under the Local Government Act 1976 (the Act).
C As the local authority, the second respondent administers the running of the city of Petaling Jaya. The second respondent is now known as the Majlis Bandaraya Petaling Jaya (MBPJ).

[8] In 2003, the Sports Club, which was a registered society under the
D Societies Act 1966 and operated under the auspices of the second respondent, was given the sole right and license to manage the billboard sites. The purpose of the aforesaid right is to provide a mechanism for the Sports Club to raise funds so that it could carry its activities.

[9] With the acquired sole right to manage the advertising sites, the Sports
E Club entered into written agreements with the respective media operators whereby the relevant Billboard Licensed Fees of the second respondent would be paid to the second respondent on behalf of the Sports Club with an additional amount to be paid to the Sports Club. The aforesaid payments are the consideration payable by the licensed media operators for their rights
F to use the advertisement sites. The additional amounts to be paid to the Sports Club was the product of the mechanism put into place by the second respondent to allow the Sports Club to generate fund so that it could carry out its activities. It is not disputed that these additional amounts can come in the form of monetary payment or in kind.

G **[10]** The sponsorship amounts for the licensed sites were paid to the Sports Club account and not paid to the designated Local Authority Fund of the second respondent under the Act.

[11] However, sometime in 2005, the Sports Club and the second respondent had great difficulty in recovering the consideration due under the
H Sports Club agreements due to the fact that the Sports Club did not have the requisite manpower to effectively manage and administer the advertisement sites.

[12] To overcome this collection difficulty, the second respondent in 2005 decided to privatise the Billboard Advertisement Scheme and in doing so, the
I second respondent called for tenders. The appellants were one of the three

tenderers in the privatisation exercise. It is from this privatisation exercise that the legal suit of the appellants stems from. The appellants fashioned their claims in the re-amended statement of claim as follows:

> 11. In late 2005, the 1st Defendant on behalf of MPPJ as part of a privatisation scheme invited 3 Licenced Media Operators, consisting of Seni Jaya, Big Tree Sdn. Bhd. and one Kurnia Outdoor Media Sdn. Bhd. ('Kurnia Media') to submit tenders to provide integrated management services in respect of all the MPPJ Sites. The MPPJ Sites consisted of the following:
>
> (i) 172 specified MPPJ Sites in Petaling Jaya identified by MPPJ itself ('Package A Sites'); and
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> (ii) all other MPPJ Sites then existing in Petaling Jaya excluding the Package A Sites ('Package B Sites').
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> 12. The company whose tender was accepted would:
>
> (i) manage and/or administer the MPPJ Sites;
>
> (ii) fulfil the contractual obligations of the Sports Club to MPPJ and the other Licenced Media Operators under the Sports Club Agreements; and
>
> (iii) collect monies due to the Sports Club and MPPJ including the Sport Club Payments and MPPJ Billboard Licence Fees, for onward payment to the Sports Club and MPPJ ('Billboard Privatisation Scheme').

[13] It is the contention of the appellants that their tender for the Billboard Privatisation Scheme had been successful resulting in an agreement with the second respondent on the following terms as set out in the re-amended statement of claim:

> 14. At the invitation and on the inducement of the 1st Defendant, Seni Jaya and Orion Mesra jointly submitted a proposal for the Billboard Privatisation Scheme to MPPJ on 14.12.2005 in accordance with the terms as stipulated by the 1st Defendant, for the exclusive management and operation of the Package A and Package B Sites on terms ('Proposed Billboard Privatisation Scheme') which *inter alia* included the following express conditions:
>
> (i) the Plaintiffs would be given a concession for the exclusive right to manage and operate the Package A and Package B Sites ('the Concession');
>
> (iv) the period of the Concession for both the Package A and Package B Sites as stated in the proposed Billboard Privatisation Scheme shall be for 15 years, with an option to renew for a further 5 years;
>
> (viii) in consideration of the Package A Sites of the Concession ('Package A Consideration'), the Plaintiffs would pay:

(a) to MPPJ, the MPPJ Billboard Licence Fees on an annual basis for all the Package A sites amounting to RM179,040.00 ('Package A MPPJ Rates'); and

(b) to the Sports Club:

(i) a 'one off' payment of RM320,000.00 for Package A, payable upon MPPJ's acceptance of the Proposed Billboard Privatisation Scheme ('Package A Initial Payment'); and

(ii) an annual payment for Package A of RM1,780,000.00 ('Package A Annual Payment') calculated at the rate of RM10,000 per annum for 163 billboard panels and RM30,000.00 per annum for 9 bulletin panels, which together amount to the 172 Package A Sites. The Package A Annual Payment for the first year was to be paid upon MPPJ's acceptance of Seni Jaya's Proposed Billboard Privatisation Scheme.

[14] The appellants premised their case heavily on the letter dated 16 December 2005 signed by the first respondent. They pleaded as follows:

> In response to the Proposed Billboard Privatisation Scheme of the Plaintiffs, the 1st Defendant on behalf of MPPJ by letter dated 16.12.2005 agreed 'in principle' to give the Concession to the Plaintiffs, to manage and operate the outdoor advertising sites in areas under the control and jurisdiction of MPPJ, save for the sites adjacent to the Sprint Highway, Lebuhraya Damansara Puchong, New Klang Valley Expressway and Federal Highway ('the Agreement').

[15] In relying on the aforesaid letter, the appellants made payment on the same day ie, 16 December 2005 to the Sports Club of its entitlement to the one-off payment of RM320,000 and the annual payment of RM1,780,000 amounting in total to RM2,100,000. The effect of these payments according to the appellants is this:

> 16. "Acting on the faith and truth of the said representations of, and the Agreement with, the Defendant and being induced thereby, the Plaintiffs by letter of the same date (16.12.2005) to the 1st Defendants accepted the grant by the 2nd Defendants of the Concession. Pursuant to the Agreement reached between the parties, the Package A Initial Payment of RM380,000.00 and Package A Annual Payment of RM1,780,000.00 (collectively referred to as the 'Package A Payment') stipulated in the Proposed Billboard Privatisation Scheme, which amounted to the sum of RM2,100,000.00 was paid by the Plaintiffs to the Sports Club on 16.12.2005. The sum of RM2,100,000.00 was received by the Sports Club for and/or on behalf of MPPJ.

[16] Premised on the contention that there has been a concluded agreement between the appellants and the second respondent, they launched this legal suit in 2017 claiming for specific performance of the alleged concession agreement or in the alternative for damages against the second respondent.

High Court

[17] After a trial, the High Court dismissed the appellants/plaintiffs' suit holding, *inter alia*, that the Sports Club could not lawfully be an agent of the licensing functions of the second respondent and that no contract had come into being with the appellants and that even if there was at all a contract it was void for illegality. The first respondent did not enter appearance personally and hence was unrepresented throughout the trial and the appeal.

Court Of Appeal

[18] The Court of Appeal affirmed the decision of the High Court on the ground that no binding agreement had been concluded between the appellants and the second respondent.

Our Grounds Of Decision

Was There A Concluded Contract?

[19] It is undisputed between the parties that the first issue which we have to deal with or deliberate on is simply "whether there was a concluded contract between the appellants and the second respondent". The leave questions in our view would only become relevant and contentious issues in the whole scheme of things if we find that there was indeed a concluded contract. As correctly pointed by the learned counsel for the second respondent, the appellants had sought an order of specific performance 'of the agreement' to award the Billboard Privatization Scheme as a concession to the appellants.

[20] What amounts to a concluded contract is a matter of fact and law. The law is as prescribed in s. 7(a) of the Contracts Act 1950 which reads as follows:

> 7. Acceptance must be absolute
>
> In order to convert a proposal into a promise the acceptance must:
>
> (a) be absolute and unqualified;

[21] What s. 7(a) says is simply this. For any concluded agreement to come into existence, there must be a clear and definite offer by the proposer and an "absolute and unqualified" acceptance of the same by the offeree. The phrase "absolute and unqualified" is critical in that any acceptance coupled with any condition can never be an "absolute and unqualified" acceptance.

A It must be absolute in that all terms set out in the offer must be accepted. It must be unqualified in that acceptance attached with condition is a qualified acceptance. Once such conditional acceptance is on the negotiating table so to speak, the parties are simply back to the negotiating mode as there is now a counter-offer by the offeree which in effect rejects the proposal. B Withdrawal of the conditional acceptance *per se* would not revive the original offer. Only an absolute and unqualified acceptance of the counter offer by the proposer will there be a concluded contract between the proposer and offeree.

[22] As to what should be the approach to employ in unraveling the factual C matrix to determine whether parties had reached consensus *ad idem* on the terms, the Federal Court in *Deutsche Bank (M) Bhd v. MBf Holdings Bhd & Anor* [2015] 8 CLJ 1068, reasoned that that question "could only be gleaned from the mandate letter, the emails/letters and conduct of the parties" and "not on the subjective mind, but upon a consideration of what was D communicated between them by words or conduct... from the perspective of the notional reasonable man." In other words, the test is an objective one.

[23] A similar approach was in fact applied in an earlier Supreme Court decision in *Ayer Hitam Tin Dredging Malaysia Bhd v. YC Chin Enterprises Sdn Bhd* [1994] 3 CLJ 133 where Edgar Joseph Jr SCJ opined as follows:

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> The authorities show that such inference must be drawn from the language the parties have used, their conduct, regard being had to the surrounding circumstances, and the object of the contract. In other words, in its task of ascertaining the intention of the parties, the Court will, generally speaking, apply an objective test, more particularly, it will ask F itself, what would the intention of reasonable man be, if they were in the shoes of the parties to the alleged contract.

[24] With the above guidelines at the foremost of our minds, we now apply the same to the factual matrix herein. Learned counsel for the appellants in advancing his contention that there is a concluded contract between the G appellants and the second respondent relied in our view on the following events:

(a) The appellants' proposal dated 14 December 2005 in which the following terms, in the words of the learned counsel, were offered:

H (i) A concession was to be granted by MBPJ to Seni Jaya and Orion Mesra for exclusive rights to manage all outdoor advertising sites in Petaling Jaya, excluding sites within ROW (Right of Way) of the Sprint, LDP, NKVE and Federal Highways;

(ii) An undertaking was given by MBPJ not to issue or renew any licences to any other parties for sites built on privately owned land I or buildings;

(iii) The concession period was for 15 years with an option to renew for 5 further years;

(iv) Package A was to consist of the 172 specially identified billboard panels identified by MBPJ in the Site List, which was annexed as Appendix 10 to Seni Jaya's proposal (Package A sites);

(v) On or before 1.1.2006 MBPJ was to deliver the 172 Packages A Sites to Seni Jaya and Onion Mesra;

(vi) Package B was to consist of all other outdoor advertising sites in Petaling Jaya (excluding the Package A Sites) amounting 450 sites (Package B sites);

(vii) On or before 1.1.2007, MBPJ was to deliver the 450 Package B Sites to Seni Jaya and Orion Mesra;

(viii) The consideration was to be as follows:

(a) To MBPJ, payment of the licence fees for all the Package A and Package B sites, on annual basis;

(b) To the Sports Club, a one-time payment of RM320,000.00 in consideration for Package A (Package A Initial Payment);

(c) Also to the Sports Club, an annual payment of RM1,780,000.00 for the 172 Package A Sites computed as follows (Package A Annual Payment).

(d) Annual Payments to the Sports club for all the Package B Sites at the same rates as in Paragraph © as applied for 172 Package A sites.

(b) MBPJ's letter of Seni Jaya's proposal agreed in principle dated 16 December .2005.

(c) Seni Jaya's payment to the Sports Club totaling RM2.1 million and Orion Mesra also undertook to carry out all maintenance works in respect of the Package A and Package B sites, throughout the 15 to 20 years concession period.

(d) The Board meeting of the second respondent dated 22 December 2005.

(e) Confirmation letter dated 21 March 2006 by the second respondent.

(f) Meeting of Councillors of the second respondent dated 31 May 2006.

Letter Dated 16 December 2005

[25] As much reliance is made on the letter of 16 December 2005 by the appellants, a detailed analysis of the same must be made by us and we do so by setting out the same in full here:

Pengurusan dan Operasi Papan Iklan Luar (Outdoor Advertising) di kawasan MPPJ

Dengan hormatnya saya merujuk kepada surat tuan bertarikh 14 Disember 2005 berkenaan perkara tersebut diatas. Pihak MPPJ Jaya **secara prinsipnya** bersetuju memberi konsesi kepada syarikat tuan di dalam pengurusan dan operasi papan iklan luar di kawasan MPPJ kecuali kawasan-kawasan ROW lebuhraya Sprint, LDP, NKVE dan lebuhraya persekutuan dan lain-lain tempat yang dipersetujui oleh kedua-dua pihak.

2. **Perkara-perkara penting dan utama yang dikemukakan oleh pihak tuan di dalam surat tersebut akan diteliti oleh pihak kami dan akan dibincangkan dengan pihak tuan secepat mungkin.**

Sgd.

Yang Dipertua
Majlis Perbandaran Petaling Jaya
(emphasis added)

[26] Though the words "agreed in principle" were used in the letter dated 16 December 2005, they must be considered in the context of the entire letter. The proposal made by the appellants was not short in details and it is glaring in the response made by the second respondent, there was no reference to any of the proposed terms. In fact, in the second paragraph of the letter, it states in no uncertain terms that important terms and conditions ('perkara-perkara penting dan utama') will be discussed between the respective parties. With respect, how one can treat that as an absolute and unqualified acceptance is beyond us. It is at best a qualified or conditional acceptance which in law is in effect a rejection.

[27] Learned counsel for the appellants, however, submits that the factual matrix, despite the lack of a formal executed agreement, had given rise to a binding contract. With respect, we find no merit in such contention and our reasons are these. Firstly, the proposal submitted by the appellants envisaged a 15 to 20 years monopoly in the use of the numerous advertising sites in the city of Petaling Jaya which would involve matters such as concession payments, approvals from numerous regulatory bodies, location of advertisement sites, delivery dates and plus the fact that many of the sites of which the appellants are claiming exclusive or monopoly rights by the concession are sites claimed by licensed third parties. Surely the rights of these third parties must be settled or taken care of between the relevant third party and the second respondent before the second respondent can agree to anything. It is not insignificant that the proposed cl. 5.1.6 of the draft agreement put forth by the appellant provides that the second respondent "upon expiry of the third party permits, not to extend or renew such third party permits under any circumstances". Such onerous term has great

ramifications to the second respondent and we are sure that it had been fully advised on those ramifications which could include legal suits from the relevant third party or at best compensations to be paid to the relevant third party. No reasonable enterprise would agree to such onerous term unless and until the full ramifications are known to it. With respect, the appellants' solicitor's contention that all the terms had been agreed to by the second respondent is bereft of any evidence, written or otherwise. It is also bereft of any commercial sense.

[28] Secondly, there was in fact a proposed agreement between the appellants and second respondent and that, in itself, as pointed out by learned counsel for the second respondent, ran into 37 pages and contained numerous terms of detailed and far-reaching effect. A cursory look at that document would show that the terms proposed are complex to say the least and would require well trained commercial legal adviser to give proper advice as it involved the capacity of the second respondent, being a statutory body, to enter into business relationship with commercial enterprises. This was correctly picked up by the Legal Department of MBPJ where its Legal Advisor at a council meeting dated 22 December 2005 expressed his reservation:

> iv. ... Penasihat Undang-undang Majlis memberi komen bahawa keputusan kepada Perkara 20.5 adalah bertentangan dengan undang-undang. MPPJ tidak boleh menswastakan tapak 172 kepada 2 syarikat dengan menandatangani perjanjian kerana MPPJ adalah bukan tuan punya tanah atas tapak iklan berkenaan, MPPJ tiada '*Locus Standi*'.

[29] Thirdly, the second respondent is a statutory body and it is plain as daylight that for the second respondent to enter any commercial transaction of such a nature, like any private commercial entity, it would require an appropriate approval in a form of minutes of Council meetings. We see no such written approval by the second respondent. The lack of such written consent basically shows that it had not or could not agree to the proposal put forth by the appellants.

[30] Fourthly, simple common-sense dictates that no reasonable person or commercial enterprise would be bound by such a loose arrangement as that advanced by the appellants' counsel when the business relationship encompasses a monopoly of some 15 years of unlimited use of advertising sites and involves quite a substantial amount of monetary consideration.

[31] Fifthly, as rightly pointed out by learned counsel for the second respondent, if there was indeed a concluded contract, there was no necessity for the first appellant by a letter dated 26 May 2006 to protest the failure of the second respondent to reply on the proposed changes. Such protestation simply infers that there was no concluded contract until a formal agreement was executed by respective parties.

[32] In regard to the payment of RM2,100,000 to the Sports Club by the appellants, it is a matter between the appellants and the Sports Club as we find no evidence to link that payment to the alleged concluded contract between the respective parties. At best, the payment was made on the hope that there will be a concluded contract between the appellants and the second respondent. Hope plus payments to a third party in the circumstances could not be equated to a concluded contract. Again, if that payment is part of the consideration to the proposed agreement, surely mention must be made of that consideration in the proposed agreement sent to the second respondent to consider. It simply does not make sense not to mention that RM2.1 million consideration in the proposed agreement. We agree with learned counsel for the second respondent that the appellants made the fatal risk in not naming the Sports Club as a party to the suit to advance their contention that the Sports Club is an agent to the second respondent.

[33] As we have found that there is no concluded contract, we do not find it necessary to deliberate on the leave questions. We are fully aware that the questions posed are questions where leave had been granted by this court. Be that as it may, this court continues to have the discretion whether to answer those leave questions especially when answering them becomes an academic exercise. (see *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Anor v. Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2003] 3 CLJ 349).

Conclusion

[34] What the High Court and the Court of Appeal had done was merely to apply the right law to the factual matrix to the same. From our analysis, no one can say that their conclusions were conclusions which no reasonable tribunal would arrive at. Their reasonings were premised on established evidence adduced in court and consistent with both common and commercial sense. What that simply means, no appellate intervention is warranted by this court.

[35] Accordingly, we dismiss the appeal with costs in the sum of RM50,000 subject to payment of allocator fees. We also order that deposit be returned to the appellants.